

Internal Revenue Service

**memorandum**

CC:TL:Br3

WEArmstrong

date: OCT 8 1987

to: Deputy Regional Counsel, Western Region CC:W

from: Director, Tax Litigation Division CC:TL

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subject: Apportionment of Income for Non-filing Spouses Domiciled in  
Community Property States

This memorandum is in response to your request of July 28, 1987, for technical advice on the subject of the apportionment of income between non-filing spouses domiciled in community property states.

ISSUES

(1) With respect to taxpayers domiciled in community property states who earned income but failed to file returns and who were married and still may have been married during the tax year in issue, whether a notice of deficiency should be issued to each presumed spouse, apportioning one-half of the wage income to the non-earning spouse and all of the income to the earning spouse.

(2) Whether the apportionment of one-half of wage income to the non-earning spouse and all of the wage income to the earning spouse should be reflected on a single statutory notice, with respect to taxpayers domiciled in community property states who failed to file returns and who were married and still may have been married during the tax year in issue.

CONCLUSION

We believe with respect to non-filing taxpayers domiciled in California and other community property states that, where the Commissioner possesses sufficient facts regarding marital status, property, income, etc., to correctly compute the tax liability of each spouse, the issuance of inconsistent statutory notices is not necessary. Rather in such case, separate statutory notices should be issued to each spouse in which only the tax liability and information of that spouse is reflected thereon. Where the Commissioner does not possess sufficient facts to correctly determine the tax liability of two taxpayers who may or may not still be married and who are domiciled in a community property state, the Commissioner is justified in issuing separate inconsistent statutory notices which reflect, to the extent

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possible, only the tax liability and information of the taxpayer to whom it is issued. Thus, for example, where wages are involved; the wage earner is known, and the parties may or may not still be married, the Commissioner is justified in issuing separate notices in which all of the wage income is allocated to the earning spouse and one-half of the wage income is allocated to the non-earning spouse. Otherwise, where sufficient information does not exist to make that type of allocation, the Commissioner is justified in allocating to each spouse all of the income arising from the same source or transaction. Where separate inconsistent statutory notices are issued, the Service should employ procedures that will insure that no more than 100 percent of the tax liability arising from a single taxable event is collected.

### FACTS

You have been asked for advice on the subject of the apportionment of wage income between non-filing spouses domiciled in California. You have recommended that unless both spouses signed a marital agreement which characterizes wage income as belonging to one spouse, the Examination Division should issue a notice of deficiency to each spouse, apportioning one-half of the income to the non-earning spouse and all of the income to the earning spouse. At least one District Counsel, you state, believes your advice to be wrong. This is because you would allow to be reflected within a single statutory notice the inconsistent or alternative positions (apportionment) noted. You seek our advice as to how this problem should be handled with regard to taxpayers domiciled in community property states.

### DISCUSSION

The laws of the state in which a taxpayer is domiciled govern whether the taxpayer has community property and thus community property income. For Federal tax purposes, property is classified according to the laws of the state in which a taxpayer is domiciled. When married taxpayers domiciled in community property states elect to file separate Federal returns, the classification of income as community property or separate is paramount. This is because unless otherwise agreed, one-half of all community property income must be reported on the separate return of each spouse.

Generally, community property income is all income from community property, salaries, wages, and other pay for the services of either or both a husband or wife during their marriage. Separate property, on the other hand, under the community property system, is income from separate property and is taxable generally only to the owner of the separate property. In some states, however, income from separate property and real estate is treated as community income.

Under certain circumstances, community property laws will not apply to income from community property for Federal income tax purposes. As a result, a taxpayer may have to report on his or her separate return all of the income from community property assignable to him or her. The circumstances precluding the application of community property laws include, inter alia, the qualification under I.R.C. § 66 of one spouse for relief from separate return liability for community property income, an agreement of spouses affecting the status of property, and the termination of the marital community.

The Service does not have the authority to file a joint return for married taxpayers, thereby making them jointly and severally liable for a tax liability due to the other spouse. Rather, the benefit of joint returns are available only if a joint return is filed by taxpayers. Armaganian v. Commissioner, T.C.M. 1978-305. Where the Service is required to file a return under I.R.C. § 6020 for a taxpayer who has failed to file a return, the tax liability of the taxpayer is determined as if he or she had elected to file a separate return. I.R.M. 4562.4

It is well established that "pending collection of taxes alleged to be due, the Service is permitted to assert inconsistent positions and to assess deficiencies against more than one person for the same tax liability if there is an accepted legal basis for each assertion." Stone v. United States, 405 F. Supp. 642, 649 (S.D.N.Y.), aff'd, 538 F.2d 314 (2d Cir. 1976), Wiles v. Commissioner, 499 F.2d 255, 259 (10th Cir. 1974), cert. denied, 419 U.S. 966 (1974). The practice is grounded in the Commissioner's need to protect the revenue and to avoid a windfall for a delinquent taxpayer. See, Estate of Goodall v. Commissioner, 391 F.2d 775, 782 (8th Cir. 1968), cert. denied, 393 U.S. 829 (1968). As noted by Judge (now Mr. Justice) Blackmun in Estate of Goodall:

[g]ood faith inconsistency buttressed by acceptable argument, when considered in the framework of the Commissioner's responsibilities, cannot be regarded as an offense which provides a bar to bona fide tax litigation

Id. at 783.

With respect to married taxpayers domiciled in community property states, the Service, in certain cases, will possess enough information regarding the status, property, and income of the married taxpayers to correctly determine the tax liability of each spouse. Where this is the case and the taxpayers have failed to file, the statutory notices issued to the taxpayers should characterize and allocate income in accordance with the

community property laws of the state or states in which income is earned and the taxpayers are domiciled.

In most cases, however, the Service will not know whether the circumstances (e.g., divorce, spousal agreement affecting the status of property) existing at the time income was earned, preclude the application of community property laws. In those cases it is justifiable, based on the Commissioner's need to protect the revenue, to issue a statutory notice to both presumed spouses for the entire presumably community property income arising from the same activity or transaction. Alternatively, in the case for example of wages, where the Service knows who is the wage earner, it is justifiable to send a statutory notice to the earning spouse determining a deficiency with respect to the entire income and one to the non-earning spouse determining a deficiency with respect to one-half of the same wage income. See e.g., Gerardo v. Commissioner, 552 F.2d 549 (3d Cir. 1977) (where the Third Circuit upheld the issuance of alternative deficiency determinations to three individuals for the total tax due from the same gambling operation). When such inconsistent deficiency notices are issued by the Service, for more than 100 percent of income resulting from the same activity, the Commissioner should employ procedures that will insure against the collection of double taxes. Id. at 555-556.

As noted, when a taxpayer fails to file a return, the Service is authorized under I.R.C. § 6020 to prepare a return for the taxpayer. Since only taxpayers can elect joint filing status, the returns prepared by the Service for non-filing taxpayers under I.R.C. § 6020 reflect a tax liability based on separate rates. Because the Service treats all taxpayers (including married taxpayers) who fail to file returns and for whom returns under I.R.C. § 6020 are prepared as having elected separate filing status, separate deficiency notices rather than a single statutory notice are issued to them with respect to their individual tax liability. Since the Commissioner, with respect to I.R.C. § 6020 returns prepared for non-filing taxpayers domiciled in community property states must also compute the tax liability of such taxpayers using separate rates, it also follows that only separate statutory notices reflecting only the tax liability of the taxpayer should be issued.

In addition to the view that separate deficiency notices should be sent to non-filing taxpayers for whom returns were prepared under I.R.C. § 6020, separate statutory notices, rather than a single statutory notice containing inconsistent positions, should also be sent to non-filing taxpayers domiciled in community property states, who may or may not have been married during the year in issue, in order to avoid the disclosure of tax return information under I.R.C. § 6013 to the other or the former spouse. See Haywood v. United States, 642 F.Supp. 188 (D. Kan. 1986). For purposes of I.R.C. § 6103, tax return information

includes taxpayer's identity, the nature, source, or amount of taxpayer's income, payments, receipts, and deductions. I.R.C. § 6103(b).

Aside from the two reasons noted, the setting out in a single statutory notice of alternative or inconsistent positions with respect to two or more different taxpayers can also result in a complex and confusing statutory notice. Further, because of the inconsistency of such statutory notice, the Commissioner may be put in the position of having the burden of proof with respect to a portion of the determined deficiency. See Revell, Inc. v. Riddell, 273 F.2d 649, 659 (9th Cir. 1960).

Based on the discussion above, we believe with respect to non-filing taxpayers domiciled in California and other community property states that, where the Commissioner possesses sufficient facts regarding marital status, property, income, etc., to correctly compute the tax liability of each spouse, the issuance of inconsistent statutory notices is not necessary. Rather in such case separate statutory notices should be issued to each spouse in which only the tax liability and information of that spouse is reflected thereon. On the other hand, where the Commissioner does not possess sufficient facts to correctly compute the tax liability of two individuals who may or may not still be married and who are domiciled in a community property state, the Commissioner in such case is justified in issuing separate inconsistent statutory notices which reflect, to the extent possible, only the tax information of the taxpayer to whom it is issued, but determines the maximum potential tax liability of the taxpayer under the controlling state law. Where separate inconsistent statutory notices are issued, the Service should employ procedures that will insure that no more than 100 percent of the tax liability arising from a single taxable event is collected.

If we can be of any further assistance to you in this matter, please contact us.

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Director

By: 

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cc: District Counsel, Las Vegas CC:LV:TL